Office-Supreme Court, U.S.
FILED
JUL 19 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1613

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROLAND G. HUEBNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners violated a district court order forbidding them from dredging the wetlands on their property without a permit from the United States Army Corps of Engineers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 752 F.2d 1235. The opinion of the district court (Pet. App. C1-C35) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) was entered on January 11, 1985. The petition for a writ of certiorari was filed on April 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is an action for civil contempt brought by the United States, alleging that petitioners violated a consent decree regarding the maintenance of wetlands in Jackson County, Wisconsin. In 1977, petitioners bought "Bear Bluff Farms," a 5,000-acre area, comprised mostly of wet sedge meadows and shrub swamps (Pet. App. C2) upstream from

the Necedah National Wildlife Refuge and the state of Wisconsin's Meadow Valley Wildlife Area. Shortly thereafter, the United States filed a complaint in the United States District Court for the Western District of Wisconsin seeking to enjoin petitioners from draining the wetlands on Bear Bluff Farms. Specifically, the United States sought to prevent petitioners from draining wetlands by means of digging or enlarging several miles of ditches, and from discharging the dredged material into the surrounding wetlands, until petitioners received a discharge permit pursuant to Section 301 of the Clean Water Act (CWA), 33 U.S.C. 1311. This action was settled by a consent order entered by the district court in 1978. Among other things, the order required petitioners to pay a $1,000 civil penalty and permanently enjoined them from discharging dredged or fill materials into wetlands on Bear Bluff Farm "except as in accordance with a Department of Army [Corps of Engineers] permit and other lawful authority" (Pet. App. C2). In addition, the order required petitioners to maintain the integrity of wetlands in the diked reservoirs on the property (*id.* at A4).

In 1982, the United States moved for an order to show cause why petitioners should not be held in civil contempt for violating the 1978 order. The government charged, inter alia, that petitioners had continued and expanded the permitless ditching and discharging activities that had been forbidden by the court order. The government further contended that petitioners had leveled the dikes and otherwise attempted to drain the wetlands within the three reservoir areas protected by the 1978 order. Following six days of evidentiary hearings in April and May 1983, the district court found that petitioners had violated the 1978 order at 11 different sites (Pet. App. C17-C28). On November 4, 1983, following several more days of evidentiary hearings, the district court ordered a 23-part restoration plan designed

"to restore water levels and associated environmental conditions consistent with the terms and requirements of the Court's June 5, 1978 order" (*id.* at C29).

2. On January 11, 1985, the court of appeals affirmed in all respects but one (Pet. App. A1-A22).[1] The court found (*id.* at A12) that petitioners had violated the court's specific order "to protect the integrity of the dikes" of the three reservoir areas for "maximum drainage control" by plowing the reservoirs and flattening the dikes with a large marsh plow[2] in order to prepare the land for planting dry land crops. The court also concluded that petitioners violated the order by deepening several existing ditches and excavating an entirely new ditch in conjunction with the reservoir plowing. *Id.* at A13-A14. The court observed that, whether or not petitioners' ditches could be characterized as "irrigation" ditches, the ditching activity on Bear Bluff Farms required a permit under CWA Section 404(f)(2), 33 U.S.C. 1344(f)(2).[3] That section requires a permit for all discharges that "bring[] an area of navigable waters into a use to which it was not previously subject [and] where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." The court concluded that petitioners' permitless dredging of 10 acres of native wetlands to expand an artificially constructed cranberry bed also violated the order in light of this statutory provision (Pet. App. A15).

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[1]The court of appeals reversed one aspect of the district court's restoration plan, not relevant to this petition, which had required petitioners to restore to native wetlands a permitless 10-acre expansion of a cranberry bed (Pet. App. A19-A20).

[2]A marsh plow is a large ground-breaking device that must be pulled simultaneously by two heavy tractors (Tr. 948).

[3]Section 404(f)(1)(C), 33 U.S.C. 1344(f)(1)(C), exempts discharges "for the purpose of construction or maintenance of * * * irrigation ditches" from the Act's general permit requirements. The exemption does not apply, however, to the specific permit requirement of Section 1344(f)(2).

The court of appeals also concluded that the petitioners had violated the 1978 order in other respects. The court identified (Pet. App. A14) as violative of the order petitioners' permitless bulldozing of excess roadfill into adjacent wetlands and their maintenance of farm roads in derogation of the "best management practices" required by CWA Section 404(f)(1)(E), 33 U.S.C. 1344(f)(1)(E). And the court of appeals found (Pet. App. A15) that petitioners violated the court order by scraping with bulldozers, leveling, and redistributing wetlands vegetation, all without obtaining a permit.

Having found several violations of the 1978 court order, the court of appeals affirmed the restoration plan ordered by the district court in all but one respect (see note 1, *supra*) (Pet. App. A18-A20). Under this plan, petitioners are required to maintain certain water levels in the ditches on Bear Bluff Farms—to prevent the ditches from draining the surrounding wetlands—and to conduct other activities designed to restore the hydrologic regime on the property.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The factbound questions it presents do not warrant further review.

Although petitioners contend (Pet. 6-8) that the court of appeals incorrectly imposed a permit requirement on some of their operations by an unduly expansive reading of Section 404(f)(2), we note that much of the court of appeals' decision is not contested by petitioners. They do not, for example, dispute the lower courts' determinations that the 1978 court order was violated by the flattening of the three diked reservoirs and by petitioners' use of a bulldozer to scrape and redistribute wetlands vegetation over 45 acres at "site 13." Thus, a considerable portion of the contempt order and restoration plan is not affected by this petition for certiorari.

Petitioners contend that the court of appeals erred in refusing to exempt their ditch-digging activities under Section 404(f)(1)(C). First, petitioners assume that all of these ditches were "irrigation" ditches covered by that statutory section. This assertion is not supported by the facts. Much of the ditching done by petitioners was for the purpose of draining the land in order to plant dry land crops, not for irrigation purposes. One of the petitioners, William Huebner, admitted to Corps personnel that his ditching activity was designed to drain the water table in the adjacent wetlands "from two to four feet" (PX I; Tr. 780). The evidence also indicated that petitioners' ditches, which measured approximately 30 to 60 feet wide and 12 to 15 feet deep, were far larger than those found on neighboring farms (Tr. 210, 388-389), and, indeed, were precisely the type of ditch that would be dug by a person who desired to drain the surrounding wetlands (Tr. 638-639).

The district court accordingly held that "[b]ecause the ditches surrounding the reservoir areas were operated to drain the reservoirs in preparation for dry land farming, the enlargement of these ditches is not an activity excepted from the permit requirements" (Pet. App. C21). Rather, these activities involved the discharge of dredged material "onto a wetland in connection with the construction of a *drainage* ditch" (*id.* at C22 (emphasis added)) and hence were outside the exemption of Section 404(f)(1)(C). The court of appeals upheld the district court's rejection of petitioners' argument that the ditching activity was exempt because it resulted in raised water level in the ditches (*id.* at A13). Thus, it appears that petitioners' activities were not restricted to "irrigation" ditches and they plainly went beyond mere "maintenance" of existing drainage ditches; hence, they did not qualify for the Section 404(f)(1)(C) exemption.

In any event, both courts below correctly found that any exemption available under Section 404(f)(1)(C) would not apply here because petitioners' activities were covered by Section 404(f)(2), which is not subject to the "irrigation ditch" exemption. Section 404(f)(2) provides:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Petitioners' attempt to convert the wetlands of Bear Bluff Farms into dry land suitable for corn and similar crops falls squarely within the scope of Section 404(f)(2), and was not intended to be exempted by the "routine farming exemptions" of Section 404(f)(1).

The legislative history of the Clean Water Act directly supports the interpretation of the court below. For example, Representative Harsha, one of the House managers of the 1977 Amendments to the Clean Water Act and a member of the conference committee that drafted the final version of Section 404(f), stated:

> New subsection (f) of section 404 provides that Federal permits will not be required for *narrowly defined activities* specifically identified in paragraphs A-F *that cause little or no adverse effects either individually or cumulatively*. To assure that the extent of these exempted activities will not be misconstrued, paragraphs (f)(1)(D) and (E) and (f)(2) provide common sense limitations to protect the chemical, biological, and physical integrity of the Nation's waters * * * *[T]he exemptions do not apply to discharges that convert more extensive areas of water into dry land* or impede

> circulation or reduce the reach or size of the water body.

Environmental Policy Div., CRS, Library of Congress, 95th Cong., 2d Sess., *Ser, No. 95-14, A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act*, 420 (Comm. Print 1978) (emphasis added). See also *id.* at 474 (statement of Sen. Muskie). In the same vein, in *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 925-926 (5th Cir. 1983), the Fifth Circuit characterized the agricultural exemption as a "narrow" one and found it inapplicable in a case where the farming activity sought to change the character of the land to make it suitable for soybean farming.

Given the nature of the activities involved here, petitioners plainly miss the mark in asserting that the decision below renders the agricultural exemptions "a nullity in normal, day-to-day farming activities" (Pet. 8). Routine farming activities are not at issue here, and they are unaffected by the decision below. It is true, of course, that a farmer may desire, in some cases, to drain thousands of acres of wetlands and to convert the wetlands into lands suitable for such dry land crops as corn or potatoes. That is not routine farming activity, however, and Congress did not intend it to fall outside the purview of the Clean Water Act. If a farmer wants to engage in such activity affecting wetlands, he must apply for a permit under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1985